

Pete Ricketts, Governor

May 31, 2016

Thomas C. Culhane
William T. Foley
Erickson | Sederstrom, P.C., L.L.O.
10330 Regency Parkway Drive, Suite 100
Omaha, NE 68114

RE: AmeriHealth Nebraska d/b/a Arbor Health Plan - Protest of Award of March 8, 2016
RFP No. 5151 Z1 - *Full-Risk Capitated Medicaid Managed Care Program for Physical Health, Behavioral Health and Pharmacy Services*

Dear Messrs. Culhane and Foley:

Thank you for your presentation of May 17, 2016. We have carefully considered the presentation both separately and in concert with the arguments raised in your March 22, 2016 letter. As much of the information was the same, I do not believe it will be productive to rehash our prior response. Instead my intent is to address what we perceive as "new" information or argument.

1. Manual Having Force of Law

Although we continue to disagree that the Procurement Manual has the force of law, it is worth pointing out that the complaints raised by the protest regarding the manual involve areas of discretion. For example, complaints regarding the composition of the evaluation committee are not mandatory in the manual. Instead, the manual states that committee size and composition is "recommended" and that there "should" be representatives from other agencies. None of this language is mandatory and, therefore, there is discretion in the composition of the evaluation committee.

Similarly, the State has discretion in the protest process. You assert that the RFP must be evaluated using only the stated criteria and where the manual is silent and the RFP is silent (as in this case regarding rescoring), then the State has no ability to act. While we agree that the statutes require our processes to be fair and open, you have provided no law, and we can find none, that support your overly strict interpretation of Neb. Rev. Stat. § 73-503(2). Further, the legislature clearly intended to provide DAS with discretion in the plain language of the statute. To argue otherwise results in an absurd and draconian process in which the manual would have to contemplate every possible grievance scenario and contracts would have to become overly complicated by trying to identify what the manual may have missed. This is not supported by law or by common practice in public letting.

Instead, flexibility is allowed (and clearly contemplated by the statute) so long as the government's action is not arbitrary and capricious. This is the appropriate backstop for fair public contracting. In addressing this very standard, the Nebraska Supreme Court has long held that in order to be arbitrary and capricious, a decision must be without reason and result in a conclusion that "is apt to change suddenly; it is freakish, whimsical, humorsome [sic]." Central Platte Natural Resources Dist. v. City of Fremont, 250 Neb. 252, 256 (1996). In fact, the Nebraska Supreme Court has stated that the appropriate legal standard is whether the State, when using its discretion during the bidding process, is whether the State acted in bad faith. Rath v. City of Sutton, 267 Neb. 265 (2004), citing Best v. City of Omaha, 138 Neb. 325, 328, (1940).

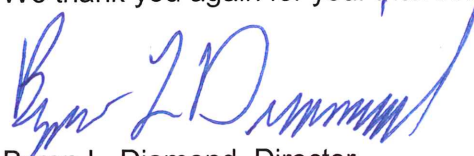
Because our process was reasoned and considered, our decision was not, by definition, arbitrary and capricious. Further, to suggest that our decision was arbitrary and capricious, or made in bad faith, because there may be other alternatives that would have been more beneficial to your client (as opposed to others) is not supported by law.

2. Failure to Address all arguments:

We acknowledge that we have not addressed every argument or nuance thereof. We have taken this position because when applied to the standard of review that governs this matter, to do so would result in substantial duplication. That is not to say we have not considered your arguments in good faith. For example, we have considered your arguments that your bid is in the best interests of the citizens of Nebraska and DHHS did not place enough weight on the corporate responsibility sections. You can imagine that others are arguing the same thing, and everyone can't be right. The bottom line is that DHHS remains in the best position to establish which criteria are more important in any particular contract. The law neither mandates nor encourages second guessing absent a showing of bad faith. As such, with these arguments and others, we merely disagree and are not persuaded by them.

For these reasons and for the reasons originally outlined in our letter of April 8, 2016, I find that there is no basis to overturn the award. I believe this contract has been awarded in good faith and pursuant to law, therefore, it is determination that the contract award will stand and the protest submitted by AmeriHealth Nebraska d/b/a Arbor Health Plan is hereby denied.

We thank you again for your interest in doing business with the State of Nebraska.



Byron L. Diamond, Director
Department of Administrative Services

cc: Bo Botelho, Materiel Administrator
Michelle Thompson, Buyer
Brad Gianakos, DHHS

BD:cmf